

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Michael Cook,

NO. C 07-05085 JW

Plaintiff,

v.

**ORDER GRANTING APPLICATION TO
PROCEED IN FORMA PAUPERIS;
ORDER DISMISSING COMPLAINT
WITH PREJUDICE**

Michael J. Astrue,
Commissioner, Social Security Admin.

Defendant.

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1915(a), Michael Cook, has filed an Application to Proceed in Forma Pauperis based on his declaration of poverty in this action against Michael J. Astrue, Commissioner of the Social Security Administration.¹ (Docket Item No. 2.) For the reasons set forth below, the Court GRANTS Plaintiff's application. However, the Court DISMISSES the complaint for failure to state a claim.

II. DISCUSSION

A. Eligibility to Proceed In Forma Pauperis

Title 28 U.S.C. Section 1915(a)(1) provides that "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or

¹ Plaintiff mistakenly names Jo Anne Barnhart as the current Commissioner.

1 criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits
2 an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to
3 pay such fees or give security therefor.” Section 1915 further states that “such affidavit shall state
4 the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.”
5 28 U.S.C. § 1915.

6 In this case, Plaintiff has declared under the penalty of perjury that he is not presently
7 employed and does not have any asset as he is currently incarcerated. (Docket Item No. 2.) Based
8 on Plaintiff’s declaration of poverty, the Court GRANTS Plaintiff’s Application to Proceed in Forma
9 Pauperis.

10 **B. Failure to State a Claim**

11 Pursuant to 28 U.S.C. § 1915(e)(2)(B), the court shall dismiss the case at any time if the
12 court determines that it “is frivolous or malicious, fails to state a claim on which relief may be
13 granted, or seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
14 1915(e)(2)(B); See also Denton v. Hernandez, 504 U.S. 25, 27 (1992). Accordingly, the Court
15 proceeds to examine Plaintiff’s tendered Complaint, which alleges as follows:

16 On November 20, 2002, the Social Security Administration (“SSA”) sent Plaintiff a
17 notice of overpayment. (Complaint, Ex. 1, Docket Item No. 1.) The notice stated that due to
18 Plaintiff’s incarceration, he was not entitled to \$2,768.44 in Supplemental Security Income
19 (“SSI”) payments made to him between October 2001 and May 2002. (Id.)

20 On February 27, 2007, SSA sent Plaintiff a notice stating, in relevant part, the
21 following:

22 This Notice replaces the Notice of November 20 2002 which you told us you
23 received when you reviewed the medical records you requested from us. Your
24 remarks in the letter you wrote, dated August 21, 2006, caused us to look at the
25 Notice of November 20, 2002 and see that indeed the Notice was not completely
26 accurate. The amount of the overpayment was less than the true overpayment and the
27 months for which you were overpaid were not totally correct.
28

1 (Complaint Ex. 2.) The Notice then listed overpayments for October and November, 2000,
2 and January, May, and December, 2002. The total amount overpaid to Plaintiff was
3 \$3,336.78. (Id.)

4 On July 27, 2007, SSA sent Plaintiff a notice stating, in relevant part, the following:

5 You filed an appeal on 04/09/07 regarding SSI returned checks when you
6 were incarcerated.

7 We have carefully reviewed your file and all the facts we have, the following
8 SSI checks were returned to SSA: 10/01, 11/01, 12/01, 02/02, 10/02, and 11/02.

9 However, there was an outstanding SSI overpayment in the amount of
10 \$3336.78 due to your incarceration of the following months: 10/00, 11/00, 01/02,
11 05/02, and 12/02.

12 We have decided to waive the outstanding overpayment of \$3336.78 and you
13 do not have to pay it back.

14 (Complaint, Ex. 3.) The Notice then stated: "If you disagree with this decision, you have the
15 right to request a hearing." (Id.) Plaintiff requested a hearing. (Id.)

16 On September 12, 2007, SSA sent Plaintiff a notice stating, in relevant part, the
17 following:

18 YOUR REQUEST FOR RECONSIDERATION REGARDING GIVING YOU
19 YOUR RETURNED SSI CHECKS IS NOT AN APPEALABLE ISSUE. YOU
20 WERE NOT DUE THOSE CHECKS DUE TO INCARCERATION SO THEY
21 WERE RETURNED TO TREASURY.

22 (Complaint, Ex. 4.) (capitals in original).

23 On the basis of the allegations outlined above, Plaintiff alleges that he is entitled to 1)
24 receive the checks that were returned to SSA, and 2) an appeal of SSA's decision. (Complaint at 2.)

25 The Court finds Plaintiff fails to state a claim on which relief may be granted for the
26 following reasons.

27 First, under 42 U.S.C. § 402(x), individuals are not entitled to SSI benefits for any month
28 during which the person is, *inter alia*, confined to a jail, prison, or other penal institution or
correctional facility for a criminal offense. Here, the SSA's notices to Plaintiff clearly reflect that
SSA made a determination that Plaintiff was incarcerated during the months at issue. SSA is
authorized to make such a determination in the first instance. See 20 C.F.R. § 404.902; 42 U.S.C. §

1 902. Plaintiff has not challenged SSA's determination regarding his incarceration. Plaintiff has not
2 alleged any facts that, if true, would entitle him to recovery of the returned checks. Second,
3 although the SSA stated in its July 27, 2007 letter that Plaintiff had a right to request a hearing if he
4 disagreed with its decision, it corrected that statement in its September 12, 2007 letter. The
5 September 12 letter explicitly excluded the appealability of SSA's decision to not return the checks
6 that were issued in error due to Plaintiff's incarceration.

7 Accordingly, the Court finds that viewing the Complaint in a light most favorable to the
8 Plaintiff, the Complaint is devoid of any merits. The Complaint is ordered DISMISSED.

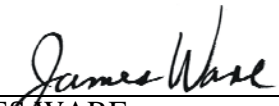
9 **C. Dismissal is With Prejudice**

10 A court should only dismiss a complaint without leave to amend when "the court can rule out
11 any possibility, however unlikely it might be, that an amended complaint would succeed in stating a
12 claim." Lopez v. Smith, 203 F.3d 1122, 1128 (9th Cir. 2000) (quoting Gomez v. USAA Federal
13 Savings Bank, 171 F.3d 794 (2d Cir. 1999)). In this case, since Plaintiff is statutorily barred from
14 receiving SSI benefits due to his incarceration, leave to amend would be futile. Accordingly, the
15 Court dismisses the Complaint with prejudice.

16 **III. CONCLUSION**

17 The Court GRANTS Plaintiff's Motion to Proceed In Forma Pauperis. However, the Court
18 DISMISSES Plaintiff's Complaint with prejudice.

19
20 Dated: November 30, 2007



JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Michael Charles Cook
T-79529
CSP- New Folsom
P. O. Box 290066
Represa, Ca 95671-0066

Dated: November 30, 2007

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy